Supreme Court, U.S.
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**In the**
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1995

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The Wilson Corporation, et al.,
*Petitioners*,

*v.*

Tom Udall, Attorney General of New Mexico,
*Respondent*.

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**On Petition for a Writ of Certiorari from the Supreme Court of New Mexico**

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# PETITION FOR A WRIT OF CERTIORARI

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August 26, 1996

24 pp

## QUESTION PRESENTED

Whether NMSA 1978 § 57-1-1, *et seq*. violates the Fourth Amendment to the United States Constitution and the requirements established by this Court in *U.S. v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964), if a court may enforce Civil Investigative Demands ("CIDs") issued under the statute on the mere allegation that a single proper purpose to use the CIDs is present, regardless of the presence of multiple improper purposes.

## LIST OF PETITIONERS, WITH PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The following list includes all Petitioners before this Court and the court below, together with their parent companies and non-wholly owned subsidiaries:

The Wilson Corporation

Colomex Oil & Gas Co.

Ross Oil Company

Robinson Oil Company

Berridge Distributing Co., Inc.

Metzger Stores

Polk Oil Company

Dial Oil Company

Eagle Energy, Inc.

Farmington Oil Company

Graves Oil & Butane Co., Inc.

Honstein Oil Company

Indian Capital Distributing Co.

Latasa Oil Company

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The Wilson Corporation; Colomex Oil & Gas Co.; Ross Oil Company; Robinson Oil Company; Berridge Distributing Co., Inc.; Metzger Stores; Polk Oil Company; Dial Oil Company; Eagle Energy, Inc.; Farmington Oil Company; Graves Oil & Butane Co., Inc.; Honstein Oil Company; Indian Capital Distributing Co.; and Latasa Oil Company respectfully petition for a writ of certiorari to review the judgment of the Eight Judicial District Court, Colfax County, State of New Mexico (hereinafter the "District Court").

## OPINIONS BELOW

*The opinion of the Supreme Court of the State of* New Mexico denying the motion for rehearing is not reported (*see* Appendix, pp. 64-65). The denial by the Supreme Court of the State of New Mexico of the petition for writ of certiorari is reported at 916 P.2d 844 (N.M. 1996) (*see* Appendix, pp. 45-46). The opinion of the Court of Appeals for the State of New Mexico is reported at 916 P.2d 1344 (N.M. App. 1996) (*see* Appendix, pp. 2-23). The opinion of the Eighth Judicial District Court, Colfax County, State of New Mexico is not reported (*see* Appendix, pp. 46-59).

## JURISDICTION

The Supreme Court of the State of New Mexico entered its Order Denying the Petitioners' Motion for Rehearing of the court's Order Denying Petition for Writ of Certiorari on June 5, 1996 (*see*, Appendix, pp. 64-65). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) which provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any state is drawn in question on the ground of being repugnant to the Constitution, treaties, or laws of the United States. . . .

## STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment of the United States Constitution provides, in relevant part, that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (*see* Appendix, p. 67).

2. The New Mexico Antitrust Act, NMSA 1978 § 57-1-1 *et seq.* (Repl. Pamp. 1987) (*see* Appendix, pp. 69-81).

## STATEMENT OF THE CASE

### A. The Nature of the Case.

Respondent, the Attorney General of New Mexico, Tom Udall, Esq. (hereinafter the "Attorney General") applied for Civil Investigative Demands (hereinafter the "CIDs") to be issued to certain New Mexico petroleum marketers pursuant to the New Mexico Antitrust Act, NMSA 1978 § 57-1-1 *et seq.* (Repl. Pamp. 1987) (hereinafter the "New Mexico Antitrust Act"). The issue on appeal to this Court arises from the Opinion of the

New Mexico Court of Appeals dated March 19, 1996, (hereinafter the "Opinion") (*see* Appendix, pp. 2-23) which upheld and sanctioned enforcement of the CIDs issued to Petitioners, even when the CIDs are used by the Attorney General for improper purposes, if the Attorney General alleges the presence of only one proper purpose behind his investigation. The New Mexico Antitrust Act, as interpreted in the Opinion, clearly violates the Fourth Amendment prohibition against "unreasonable searches and seizures." The interpretation of the scope of the New Mexico Antitrust Act in the Opinion is contrary to this Courts holding in *U.S. v. Powell*, 379 U.S. 48, 85 S. Ct. 248, 13 L. Ed.2d 112 (1964).

The New Mexico Court of Appeals, citing this Court's opinion in *Powell*, erroneously held that:

> [i]f the Attorney General makes the necessary showing, the person challenging the CID bears the burden of establishing some impropriety in the CID, such as the absence of a proper purpose for the CID. . . .

(Emphasis added) (*see* Appendix, pp. 15-16).

Further, the New Mexico Court of Appeals erroneously held that CIDs would not be quashed absent a showing that "alleged improper purposes were the Attorney General's only purposes" (emphases added) (*see* Appendix, p. 19).

Petitioners argued that requiring a demonstration that the "alleged improper purposes were the Attorney General's only purposes [behind pursuing the CIDs]," (*see* Petition for Writ of Certiorari to the Supreme Court of New Mexico, pp. 9-10) violated federal precedent and Petitioners' Fourth Amendment rights under the United States Constitution.

**B. The Course of Proceedings.**

The Attorney General alleges that he needs certain corporate documents and other confidential information from Petitioners to further his investigation of pricing and marketing of gasoline. The Attorney General applied for and obtained CIDs from the First Judicial District Court of New Mexico, which were allegedly to be used to obtain "historic price information for a period of three years" from Petitioners.

In the consolidated case before the District Court, Petitioners filed Petitions for Declaratory Judgment, (hereinafter the "Petitions") challenging the Attorney General's authority to enforce the CIDs. In the Petitions, Petitioners argued that: (1) the Applications for CIDs did not establish sufficient grounds to support the Attorney General's claim that the Petitioners had information or documents relevant to an investigation for antitrust violations in New Mexico; (2) the Attorney General violated Petitioners' rights of due process and equal protection under the United States Constitution and the New Mexico Constitution; (3) the CIDs were issued for improper purposes; and (4) the issuance of the CIDs was

unconstitutional because the Applications did not establish "reasonable cause" to believe that a violation of the New Mexico Antitrust Act had occurred.

The Attorney General responded to the Petitions by filing Motions to Dismiss on the grounds that the Petitions failed to state a claim and that Petitioners had an adequate remedy at law. The Attorney General also petitioned the District Court for enforcement of the CIDs. In response, Petitioners filed Motions for Summary Judgment or, in the Alternative, to Quash the CIDs or Motions to Quash (hereinafter collectively the "Two Motions"), depending upon the posture of the case with respect to each Petitioner. In support of the Two Motions, Petitioners filed Statements of Material Facts as to Which No Genuine Issue Exists ("SMFs") setting forth specific facts showing that the Attorney General was pursuing the CIDs for improper purposes, i.e., political purposes, including the Attorney General's desire to lobby for and facilitate enactment of legislation to artificially lower gasoline prices. The Attorney General failed to respond to the SMFs.

The District Court, by letter and Notice of Hearing dated October 21, 1994, notified the parties that an evidentiary hearing was to be held concerning all outstanding motions to be heard and outlined the burdens of proof of the parties. A properly noticed evidentiary hearing, at which all parties were represented by counsel regarding all of the issues before the District Court, was held for an entire day on November 16, 1994, (hereinafter the "Hearing"). During the presentation of his case in chief, the Attorney General did not present any evidence,

only argument of counsel. The conclusion of the Attorney General's case was followed by Petitioners' motion to dismiss the Attorney General's petitions to enforce the CIDs and to quash the CIDs. Petitioners' motions were denied. Next, Petitioners presented substantial evidence in support of their case. At the conclusion of the Hearing, Petitioners again made motions to dismiss the petitions to enforce the CIDs and to quash the CIDs, which were again incorrectly denied.

### C. The Disposition in the New Mexico Courts.

Subsequent to the Hearing, Petitioners and the Attorney General submitted proposed Findings of Fact and Conclusions of Law to the District Court. On February 23, 1995, the District Court, with only slight exception, adopted the Findings of Fact and Conclusions of Law submitted by the Attorney General and issued an order enforcing the CIDs (*see* Appendix, pp. 29-44). On March 15, 1995, the District Court dismissed the Petitions (hereinafter the "March 15 Order") (*see* Appendix, pp. 25-28).

On April 13, 1995, the District Court granted Petitioners' Motion for Extension of Time to File an Appeal of the March 15 Order.

On April 26, 1995, the District Court entered the revised Decision and Order, granting the Attorney General's Cross-Petitions to Enforce the CIDs and denying any relief to Petitioners (hereinafter the "April 26 Decision") (*see* Appendix, pp. 48-62).

On May 11, 1995, Petitioners filed a timely Notice of Appeal of the March 15 Order and the April 26 Decision. After Petitioners and the Attorney General submitted their respective appellate briefs, the Court of Appeals issued an opinion on March 19, 1996, affirming the April 26 Decision (*see* Appendix, pp. 2-23).

The Court of Appeals held that:

> We need not determine whether there was sufficient evidence to support the district court's finding that the Attorney General had a proper purpose. To affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose.

(Emphasis added) (*see*, Appendix, p. 20).

Petitioners filed a timely Petition for Certiorari on April 4, 1996, with the Supreme Court for the State of New Mexico. On May 2, 1996, the Supreme Court of New Mexico denied the Petition for Certiorari (*see* Appendix, pp. 45-46). On June 5, 1996, the Supreme Court of New Mexico denied Petitioners' Motion for Rehearing (*see* Appendix, pp. 64-65).

## D. Summary of the Facts Relevant to the Issues Presented for Review.

The Attorney General failed to introduce any evidence at the evidentiary hearing to support his alleged reasons for applying for the CIDs. Instead, the Attorney General, through counsel, provided mere argument to the District Court during the hearing to determine the enforceability of the CIDs and stated "I think I'm gonna pass" when the opportunity to present evidence occurred.

The District Court verified that the Attorney General did not present any evidence to support the CIDs. After the Attorney General failed to present evidence during his case in chief at the Hearing, the hearing transcript reflects that the District Court stated: "I'm not sure technically we have anything as evidence at this point, . . . ." Although the District Court correctly found that the Attorney General failed to present evidence, the District Court, nevertheless, deferred completely to the Attorney General's unsupported pleadings. The record is devoid of support for the District Court's ruling in favor of the Attorney General on any basis.

Evidence introduced by Petitioners at the Hearing and in the subsequent pleadings proved that the CIDs were sought for improper purposes and should be quashed.

The Attorney General, in his pleadings, alleged that, after over a year of investigation of prices of gasoline, he applied to the First Judicial District Court in Santa Fe, New Mexico for CIDs, which he alleged were issued to individuals and companies involved in the New

Mexico petroleum market, including Petitioners. However, the Attorney General never offered any proof in support of even these most basic allegations.

On the other hand, at the Hearing, after the Attorney General failed to present any evidence and after a motion to dismiss was made by Petitioners at the end of the Attorney General's case, Petitioners submitted into evidence a report entitled "Gasoline Pricing and Marketing in New Mexico an Interim Report, May 1994" (hereinafter the "Report") prepared by the Attorney General during his investigation. In addition, Petitioners submitted testimony of several witnesses in support of Petitioners' claims that the investigation and CIDs were intended to obtain information which would be used for improper legislative and political purposes. The Attorney General's press secretary provided key evidence which established the legislative purposes behind the Attorney General's request for issuance of the CIDs.

The Report issued by the Attorney General in May of 1994 during his investigation, demonstrated that the Attorney General's investigation was intended to compile information about the New Mexico petroleum market for political use by the Attorney General and the New Mexico Legislature. This information would be used to draft legislation designed to fix and lower the retail price of gasoline artificially, without regard to economic factors present in New Mexico and without regard to whether violations of the law had occurred. The Report was highly unusual and unprecedented in its issuance in the middle of an investigation by the Attorney General. The following statements were taken from the Report:

> About a year ago, we determined that continued consumer concerns, and calls for legislation to deal with the perceived problem of gasoline prices in New Mexico, required a more sophisticated analysis of this industry than had been done in this state in the past.

(Emphasis added). Some of the "questions" which the Attorney General's investigation is intended to answer are as follows:

> Are the antitrust laws as they are presently written sufficient to deal with whatever problems are found with pricing in this industry? Are stronger laws needed to discourage price discrimination, for example? Or is some other form of direct state involvement in the pricing of gasoline warranted by the realities of this market and consumer needs?

The Attorney General, after eleven months of investigation into the New Mexico petroleum market in which he found no evidence of illegality, made the commitment to focus his continued investigation as follows:

> If, however, we determine that the relative lack of price competition is not the result of violations of the existing antitrust laws, we will consider formulating legislative alternatives for dealing with the problem.

(Emphasis added). The purpose of the continued investigation, is set forth in the Executive Summary of the Report as follows:

> the Attorney General's staff will review legislation enacted in other states intended to foster increased competition in gasoline markets and decrease retail gasoline prices and consider legislative solutions to the problem.

(Emphasis added).

The Attorney General admitted, through counsel, at the Hearing and at a hearing on November 23, 1994, in the case styled *Bar-F Enterprises, et al v. State of New Mexico*, Third Judicial District Court, State of New Mexico, Civil Action File Nos. CV-94-673 and CV-94-674, that no probable or reasonable cause existed to believe that a violation of the New Mexico Antitrust Act had occurred at the time he filed applications for CIDs.

## REASONS FOR GRANTING THE PETITION

The Opinion allows CIDs to be enforced under the New Mexico Antitrust Act on the mere showing of one proper purpose behind the Attorney General's investigation, regardless of the possible presence of multiple improper purposes behind the investigation. Under the Opinion, the Attorney General's burden on motion to enforce the CIDs is met by his mere statement that, if he finds evidence of violations of the New Mexico

Antitrust Act, he will pursue criminal or civil actions. This unconstitutional burden is easily met, by the Attorney General's unsupported statements in pleadings, although uncontroverted evidence established that the Attorney General was using the CIDs for political and legislative purposes. The burden should be the converse, requiring the courts to quash CIDs which are shown to be used for an improper purpose, regardless of the presence of proper purposes. If a search or seizure is accomplished for an improper purpose, the search or seizure is clearly "unreasonable" under the Fourth Amendment.

The Opinion also conflicts with a precedent established by this Court in *U.S. v. Powell*, 379 U.S. 48 (1964).

The *Powell* opinion involved the judicial enforcement of a summons issued by the United States Internal Revenue Service (hereinafter the "IRS"), directing a corporate taxpayer to produce certain corporate tax records. This Court held that:

> [the IRS Administrator] **must** show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed. . . . It is the court's process which is invoked to enforce the administrative summons and a court may not

> permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. . . .

(Emphasis added). *Powell*, 85 S. Ct. at 255.

According to *Powell*, the good faith requirements which must be satisfied to obtain enforcement of a summons are that: (1) the investigation has a legitimate purpose; (2) the inquiry is relevant to the purpose; (3) the information sought is not already in the [requesting party's] possession; and (4) the investigation is not being conducted for an improper purpose; and (5) the statutorily required administrative steps have been followed. *U.S. v. Stuart*, 489 U.S. 353, 354, 109 S. Ct. 1183, 1184, 103 L. Ed. 388 (1989). *U.S. v. MacKay*, 608 F.2d 830, 833 (10th Cir. 1979); *U.S. v. Lask*, 703 F.2d 293, 296 (8th Cir. 1983); *LaMura v. U.S.*, 765 F.2d 974, 979 (11th Cir. 1985).

In *Lask*, the United States Court of Appeals for the Tenth Circuit found that good faith standard established in *Powell* was satisfied as follows: (1) there was testimony at the hearing regarding the summons issued for a bank's records which supported the legitimacy of the IRS's purpose in requesting the returns; (2) "the materials sought were entirely relevant" because an IRS agent testified that the information was necessary to compute tax liability; (3)

there was no indication that the IRS was pursuing matters of which it was already aware. In fact, the IRS agent testified that, without the records, he had nothing else to depend on; and (4) the administrative steps were carried out.

First, unlike the court in *Lask*, the District Court failed to evaluate whether the Attorney General is pursuing the CIDs for a legitimate purpose. At the Hearing, the Attorney General declined to provide any evidence to demonstrate good faith in applying for the CIDs. Rather, as shown in the record below, he declared "I think I'm gonna pass." On the other hand, the Petitioners did produce a great deal of evidence showing that the Attorney General obtained the CIDs for the clearly improper purpose of furthering his political, legislative agenda based upon his speculative perceptions about the need to lower gasoline prices in New Mexico through legislation. Indeed, there was evidence of retribution by the Attorney General against Petitioners who are his political adversaries. The evidence of improper purposes as disclosed in the record of the hearing before the District Court was unrefuted and falls squarely within the prohibitions of *Powell*.

Second, the Attorney General did not produce evidence at the Hearing, nor did the District Court determine whether the Attorney General's inquiry for documents from the Petitioners was proper or relevant to his alleged purpose of needing the documents for an investigation related to possible antitrust violations.

The New Mexico Court of Appeals erroneously held that the CIDs would not be quashed absent a showing that "alleged improper purposes were the Attorney General's only **purposes**." (*See* Appendix, p. 19). Further, the New Mexico Court of Appeals irrationally stated "[t]o affirm, it suffices if it was rational for the district court to be unpersuaded by the Marketers' evidence that the Attorney General was motivated solely by an improper purpose." (*See* Appendix, p. 20). Under *Powell*, a CID issued for an improper purpose, which reflects on the good faith of the particular investigation, cannot be enforced by the courts, regardless of whether there is also a proper purpose for the investigation. The *Powell* standard is necessary to prevent an Attorney General from using his office for political vengeance.

In addition to the widespread support for the guidelines established in *Powell*, federal courts have consistently found that CIDs may not be used for "aiding any legislative or political inquiry." *Petition of Emprise Corp.*, 344 F. Supp. 319, 322 (W.D. N.Y. 1972). *See also*, *In the matter of Petition of Cleveland Trust Co.*, 1972 Trade Cases ¶ 73,991 (N.D. Ohio 1969); *Chattanooga Pharmaceutical Ass'n v. U.S. Dep't of Justice*, 358 F.2d 864 (6th Cir. 1966); and *Finnell v. U.S. Dep't of Justice*, 535 F. Supp. 410 (D.C. Kan. 1982).

Allowing CIDs to be used for single or multiple improper purposes, as long as at least one proper purpose is present, mocks the dictates of the Fourth Amendment prohibition against unreasonable searches and seizures and renders the *Powell* decision and its progeny lifeless. An

imperative need is present to restrict the improper use of CIDs by state and federal agencies. CIDs are nothing more than warrants to search papers and compel testimony without any showing of probable cause. Since the Attorney General, at his option, may use the information and documents obtained under the CIDs to pursue civil and/or criminal convictions against the recipients of the CIDs, the courts must uphold the protections afforded under the Fourth Amendment. Otherwise, according to the courts of New Mexico, a state attorney general can punish political adversaries and pursue improper purposes with impunity, as long as he simply alleges at least one proper purpose.

This case represents an important opportunity for this Court to prevent the systematic erosion of the Fourth Amendment, as interpreted in *Powell*, by the various States which ignore the protections of the Fourth Amendment by enforcing CIDs, having at least one proper purpose, regardless of numerous improper purposes. Allowing enforcement of CIDs which are used for improper purposes is an affront to this Court's authority in *Powell*, and an abrogation of the Fourth Amendment to the Constitution of the United States.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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